Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1938

ANTHONY MITCHELL, individually and in his capacity as Director of the Department of Social Services of the State of Utah, SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, and ROB MUILENBURG, individually and in his capacity as the Administrator of the University of Utah Medical Center,

Appellants,

vs.

D....R....., on behalf of herself and all other persons similarly situated,

Appellee.

On Appeal from the United States Court of Appeals for the Tenth Circuit

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... i, ii

JURISDICTIONAL STATEMENT 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATUTES INVOLVED 3

QUESTIONS PRESENTED 4

STATEMENT OF THE CASE 4

THE QUESTIONS ARE SUBSTANTIAL 7

CONCLUSION 13

APPENDIX

1. Opinion, *D. R., etc. v. Mitchell et al.*, United States Court of Appeals for the Tenth Circuit, entered March 10, 1980 .....A-1

2. Notice of Appeal, filed May 27, 1980 .....B-1

TABLE OF AUTHORITIES

Cases

D... R.., etc. v. Mitchell, et al., 456 F.Supp. 609 (D.C. Utah, 1978) 2, 6

Dandridge v. Williams, 397 U.S. 471 (1970) 10

Hagans v. Lavine, 415 US. 528 (1974) 12

Page

Maher v. Roe, 432 U.S. 464 (1977) 9, 10

Miller, etc. v. Zbaraz, et al.,
Docket No. 79-5 (October Term, 1979) 7

Poelker v. Doe, 432 U.S. 519 (1977) 10

Roe v. Wade, 410 U.S. 113 (1973) 9

Siler v. Louisville & Nashville R.R. Co.,
213 U.S. 175 (1909) 12

United States v. Zbaraz,
Docket No. 79-491 (October Term, 1979) 7

Williams, et al. v. Zbaraz, et al.,
Docket No. 79-4 (October Term, 1979) 7

Statutes

28 U.S.C. § 1254 (2) 3

28 U.S.C. § 1343 (3) and (4) 2, 4

28 U.S.C. § 2403(a) 11

42 U.S.C. § 1396, et seq., (Title XIX
of the Social Security Act) 4, 6, 7, 11, 12

42 U.S.C. § 1983 ..... 2, 4

Section 55-15a-3, Utah Code Annotated,
1953, (as amended, 1977) 2, 3, 4, 6, 8

Constitution

Fourteenth Amendment, United States
Constitution 8

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

ANTHONY MITCHELL, individually and in his capacity as Director of the Department of Social Services of the State of Utah, SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, and ROB MUILENBURG, individually and in his capacity as the Administrator of the University of Utah Medical Center,

Appellants,

vs.

D....R....., on behalf of herself and all other persons similarly situated,

Appellee.

On Appeal from the United States Court of Appeals for the Tenth Circuit

JURISDICTIONAL STATEMENT

Appellants are appealing from the Judgment entered March 10, 1980, by the United States Court of Appeals for the Tenth Circuit wherein that court

declared invalid on constitutional grounds that portion of Section 55-15a-3, Utah Code Annotated, 1953, as amended 1977, which prohibits the expenditure by the State of Utah of public assistance funds "to otherwise eligible persons where the purpose of such assistance is for the performance of an abortion, unless the life of the mother would be endangered if an abortion is not performed." Appellants submit this Jurisdictional Statement to show that this Court has jurisdiction of this appeal and that the questions presented are substantial.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, entered March 10, 1980, is as yet unreported and appears in the Appendix hereto at p. A-1, *infra*.

The prior Opinion of the United States District Court for the District of Utah, Central Division, entered June 30, 1978, is reported at 456 F.Supp. 609 (1978).

JURISDICTION

This is an action brought pursuant to Title 42 U.S.C. §1983 challenging the validity of a state statute which restricts the public funding of abortions under the Medicaid program to those cases where the life of the mother would be endangered if an abortion were not performed. Jurisdiction is founded upon Title 28 U.S.C. §1343(3) and (4).

The Judgment below was entered by the United States Court of Appeals for the Tenth Circuit on March

10, 1980. Notice of Appeal was filed in the Court of Appeals by the Appellants herein on May 27, 1980, See p. B-1, *infra.*

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1254(2), permitting an appeal by a party relying on a state statute held by a court of appeals to be invalid, as repugnant to the Constitution or laws of the United States.

The validity of *no* federal statute or appropriation act is at issue in this litigation.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution

> Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 55-15a-3, *Utah Code Annotated,* 1953, (*as amended* 1977) :

* * *

The department shall not provide any public assistance for medical, hospital or other medical expenditures or medical services to otherwise eligible persons where the purpose of such assistance is for the performance of an abortion, unless the life of the mother would be endangered if an abortion is not performed.

QUESTIONS PRESENTED

1. Whether the provisions of Section 55-15a-3, Utah Code Annotated, 1953, which prohibit the use of public assistance funds for the performance of abortions unless the life of the recipient is endangered, are in violation of the provisions of Title XIX of the Social Security Act of 1935, as amended.

2. Whether the provisions of Section 55-15a-3, Utah Code Annotated, 1953, which prohibit the use of public assistance funds for the performance of abortions unless the life of the recipient is endangered, are in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The Appellee here originally brought this action in the United States District Court for the District of Utah seeking declaratory and injunctive relief pursuant to 42 U.S.C. §1983 and challenging the validity of a Utah statute upon which the Appellants herein relied. Jurisdiction was predicated upon 28 U.S.C. §1343(3) and (4).

The challenged statute prohibits the expenditure of any public assistance funds for the performance of an abortion unless the life of the mother would be endangered if the abortion were not performed. It was asserted by plaintiff, on behalf of herself and all others similarly situated, that the statute is in conflict with the requirements of the federal Medicaid statutes, §1396, et seq., of Title 42, United States Code, by prohibiting the ex-

penditure of public assistance funds for medically necessary treatment. The plaintiff further asserted that the statute is in violation of the Fourteenth Amendment to the Constitution of the United States in that it impermissibly infringes on her exercise of her constitutionally protected right to secure a medically necessary abortion. The State, on the other hand, maintained that the statute violates neither constitutional nor federal statutory requirements.

The facts in this matter were undisputed. The plaintiff is an unmarried female resident of the State of Utah who is the mother of one child. At the time of the filing of the Complaint she was in the second trimester of a pregnancy and desired to secure an abortion as a medical treatment for her condition. She was a recipient of AFDC assistance, a welfare program administered jointly by the United States and the State of Utah. Part of the assistance which the plaintiff was entitled to receive is medical care under the Medicaid statutes, §1396, et seq., of Title 42, United States Code.

The plaintiff had, prior to instituting the action and making the request that she receive an abortion, consulted with her physician, one Dr. "X", and determined that her desire to secure an abortion was an appropriate medical treatment for herself. Dr. "X" subsequently opined that the performance of an abortion was a medically necessary procedure for plaintiff's condition. Dr. "X" had staff privileges at the University Medical Center at the University of Utah, a hospital owned and operated by the State of Utah. He attempted to admit

the plaintiff to the hospital for an abortion with the expectation of reimbursement under the Medicaid program.

The defendants, however, Anthony Mitchell, the Honorable Scott M. Matheson, Robert B. Hansen, Esq., and Rob Muilenburg, refused to pay for and thus to provide an abortion to the appellant based on the provisions of Section 55-15a-3, Utah Code Annotated, 1953.

The trial court determined that the case was appropriately maintained as a class action, but denied the relief sought by plaintiff representing the class and held that the Utah statute violated neither the Constitution nor Title XIX. 456 F.Supp. 609 (U.S.D.C. Utah, 1978).

Plaintiff then appealed to the Court of Appeals for the Tenth Circuit. In an Order entered March 10, 1980, (Appendix, p. A-) the Court of Appeals reversed the District Court and held that the statute violates the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, declined, however, to rule on the statutory issue involving conformity of the Utah statute to the requirements of Title XIX of the Social Security Act. Rather, it based its holding exclusively on a constitutional theory. (See Opinion, Appendix p. A-2).

On May 27, 1980, the Defendants below, (Mitchell, Matheson, Hansen and Muilenburg) filed their

Notice of Appeal from the Order entered by the Court of Appeals on March 10, 1980.

THE QUESTIONS ARE SUBSTANTIAL

This case involves the fundamental issue of the degre to which a state may, consistent with federal law and the Constitution, impose restrictions upon the funding of abortions under the joint federal-state Medicaid assistance program. No issue has been raised as to whether any federal law or congressional enactment is valid, but rather, only the validity of a state statute has been raised.

This case bears significant similarity to the cases of *Williams et al. v. Zbaraz, et al.,* (Docket No. 79-4), *Miller etc. v. Zbaraz et al.,* (Docket No. 79-5), and *United States of American v. Zbaraz,* (Docket No. 79-491) which were consolidated by this Court and heard during the present term. However, in contrast to those cases, this case does not present a challenge to the so-called Hyde Amendment, either on constitutional or statutory grounds, and neither the Court of Appeals nor the District Court purported to rule upon the validity of the Hyde Amendment or of any other federal statute. Nevertheless, the Amendment was discussed in the case insofar as it may have had bearing on the question of whether Utah's statutory restriction on abortion funding is consistent with Title XIX of the Social Security Act.

A ruling on the merits in the consolidated *Zbaraz* cases, *supra,* now pending before the Court, may be dispositive of the issues raised in this appeal if such rul-

ing deals with the validity under the Constitution and/or under Title XIX of the Social Security Act of the Illinois statutes which, like the Utah statute, restricted the public funding of abortions to a limited group of cases. Nevertheless the Utah restriction is not identical to the Illinois limitation in that Illinois allowed public funding only where "such procedures [in the opinion of a physician] are necessary for the *preservation* of the life of the woman . . .", whereas the Utah statute permits funding where "the life of the mother would be *endangered* if an abortion is not performed." (Emphasis supplied.)

To the extent that the arguments are applicable to the Utah statute, Appellants herein are familiar with the arguments raised by Appellants in *Zbaraz* and subscribe to and endorse those arguments without unnecessarily burdening the Court with a repetition of such statements. The State of Utah filed a brief *amicus curiae* in the *Zbaraz* case in support of Appellants there which accurately reflects the views of the Appellants in the present case on the issue of the constitutionality of a restrictive funding statute such as those of Illinois and Utah.

Nevertheless, this case presents the same important issues of public law and policy, and to the extent that a ruling in the *Zbaraz* cases is not controlling or dispositive here, or to the extent that such ruling turns upon the particular language of the Illinois statutes as differentiated from the Utah statute, this Court should note probable jurisdiction since the questions remaining are so substantial as to require plenary consideration with

briefs on the merits and oral argument, for their resolution.

It is now well-settled that during the first trimester of pregnancy, the state may not infringe upon a woman's right to choose between childbirth and abortion. *Roe v. Wade*, 410 U.S. 113 (1973). During this period the right of a woman to seek an abortion and the right of her doctor to provide that abortion is considered a private matter:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U.S. at 153.

It is equally well-established that a state constitutionally may decline to pay for "the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenss of indigents." *Maher v. Roe*, 432 U.S. 464, 496 (1977).

The question remains whether, in conjunction with the administration of non-comprehensive medical assistance programs for indigents, state legislatures may permissibly classify publicly-funded abortion services by kind and degree of need so as to prohibit payment for abortions in those instances where the risk of damages to maternal health is minimized and legislatively defined interests in fetal life, childbirth and fiscal autonomy are enhanced.

The decision below appears to be premised on the supremacy of individual medical judgment and opinion when it clashes with, or fails to comprehend, the collective economic and social judgment of the community. It elevates to a criterion of Fourteenth Amendment jurisprudence the vague and undefined concept of "medical necessity" and ignores the reasoning in *Maher* that sensitive policy choices in a democracy are the province of the legislatures and not the courts.

The legislation at issue rationally furthers important governmental interests which have been legitimated in prior decisions of this Court. The state's interest in fetal life and the encouragement of childbirth were sufficient to overcome constitutional challenges in *Maher v. Roe, supra,* and its companion case, *Poelker v. Doe,* 432 U.S. 519 (1977). That the State has a legitimate interest in fiscal autonomy finds support in both *Maher* and *Poelker* which in turn derive their strength from *Dandridge v. Williams,* 397 U.S. 471 (1970).

Even if this Court resolves the *Zbaraz* cases in a manner unfavorable to the position of Appellants in the present case, it may still be necessary to grant plenary consideration in this action. This would be true especially if the Court finds it unnecessary to reach the constitutional issues presented and bases a holding in *Zbaraz* on either statutory or jurisdictional grounds.

In the present case the Court of Appeals, in its apparent zeal to simplify the arrival at a pre-ordained policy result and to avoid the complexities of the statutory issues involving Title XIX, chose to ignore the

statutory questions entirely and rule solely upon the constitutional issues. In this the Court clearly erred.

The Court of Appeals made the following observation: (See Opinion, Appendix p. A-2)

> We do not have the necessary parties before us to give complete consideration to the statutory issue including the Hyde Amendment. The Government is not a party under 28 U.S.C. § 2403(a). Thus we will start with the Constitutional issue, and discuss together the due process and equal protection issues as separate consideration does not seem warranted.

This was entirely erroneous. The issue of lack of necessary parties had not been raised by either the Plaintiff or the Defendants below, nor should it have been raised. Plaintiff had not challenged the constitutional validity of any federal statute nor the validity of the Hyde Amendment. Under 28 U.S.C. § 2403(a) the Government is entitled to become a party only when "the constitutionality of any act of Congress effecting the public interest is, or is intended to be, drawn in question" in a suit to which the United States is not already a party. That was not the case here. Federal statutes were discussed in the case, but not challenged. There is no authority for the proposition that § 2403(a) must be brought into play and the Government made a party when a state law is challenged as being violative of a federal law under a supremacy clause theory.

The statutory issue under Title XIX had been fully briefed and argued both in the trial court and the Court

of Appeals and the Trial Judge had written a careful and well-reasoned opinion dealing with the statutory questions. There was no basis for the Court of Appeals to disregard this important issue.

Furthermore, it is the general and eminently logical rule that federal courts should decide cases on a federal statutory basis where possible before reaching the constitutional issues which may be presented in the same matter. *Hagans v. Lavine*, 415 U.S. 528, 543 (1974); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909). In its haste to substitute its judgment upon the important social and policy values in this matter for that of the Utah legislature, the Court of Appeals simply ignored this fundamental principle. It is therefore entirely conceivable that the important statutory issues raised in this case will still require plenary consideration regardless of the disposition of the *Zbaraz* cases.

Appellants submit that upon a proper balancing of the interests involved in the case, this Court will find that the statute at issue here is constitutional since the classifications made rationally further several important state interests and only minimally affect pregnant indigent women and their treating physicians, and further that the statute does not conflict impermissibly under the Supremacy Clause with Title XIX of the Social Security Act.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1675

D....R...., on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

v.

ANTHONY MITCHELL, et al.,

Defendants-Appellees.

On Appeal From The United States District Court
For the District of Utah Central Division
(D.C. No. C 77-0156)

David S. Dolowitz of Parsons, Behle & Latimer, Salt Lake City, Utah, for Appellant and A.C.L.U.

Paul M. Tinker, Assistant Attorney General, State of Utah (Robert B. Hansen, Attorney General, with him on the brief), Salt Lake City, Utah, for Appellees.

Before SETH, Chief Judge, LOGAN and SEYMOUR, Circuit Judges.

SETH, Chief Judge.

This appeal concerns the use of public assistance funds for abortions in the State of Utah. The Utah-federal relationship in the administration of Social Security Act programs and welfare program is typical. The particular program here concerned is the Aid to Families with Dependent Children (AFDC) under 42 U.S.C. § 601 and following, and the Medicaid Assistance program under 42 U.S.C. § 1396 and following. Utah had chosen to participate in both programs and to administer the combined funds thereunder. 42 U.S.C. § 1396 provides generally that "medical assistance" be provided to those eligible when the resources of the individual are not enough to pay for "necessary medical services."

We do not have the necessary parties before us to give complete consideration to the statutory issue including the Hyde Amendment. The Government is not a party under 28 U.S.C. § 2403(a). Thus we will start with the Constitutional issue, and discuss together the due process and equal protection issues as separate consideration does not seem warranted.

The Utah statute does not permit public assistance funds to be used for abortions unless the life of the mother is endangered. The plaintiff challenged the statute as a violation of the fourteenth amendment, and also on the ground that it was contrary to Title XIX of the Social Security Act of 1965.

The trial court held that the state statute so limiting abortions was effective to support the defendants'

actions and was valid as against the challenge. The plaintiff has appealed.

The individual plaintiff-appellant is an unmarried woman residing in Utah and the mother of one child. When the suit was commenced she was pregnant, in her second trimester. She was receiving AFDC assistance (42 U.S.C. § 601) when she sought medical care. She consulted her doctor who determined that an abortion was a suitable treatment for this patient, and further concluded that an abortion was a medically necessary procedure in the circumstances.

The University of Utah Medical Center refused to admit the plaintiff for such an abortion on the ground that Utah statutes did not permit the use of public assistance funds for the purpose sought. The Utah statute in pertinent part is as follows:

> "The department shall not provide any public assistance for medical, hospital or other medical expenditures or medical services to otherwise eligible persons where the purpose of such assistance is for the performance of an abortion, unless the life of the mother would be endangered if an abortion is not performed." Utah Code Ann. § 55-15a-3, 1953 (1979 Supp.).

There have been many recent cases in the trial and appellat courts which raise the issues presented by this appeal. The opinions and the literature generally have both become extensive. We hesitate to add more and propose to state only what is necessary to describe the conclusions reached and to so decide the case. We fol-

low the analysis in Doe v. Rose, 499 F.2d 1112 (10th Cir.). We also have relied on Reproductive Health Services v. Freeman, ... F.2d ..... (8th Cir. No. 79-1275).

The position taken by the trial judge on the Constitutional issue was arrived at by his use of definitions of "therapeutic" and "non-therapeutic" procedures. His view essentially was that a non-therapeutic procedure was anything short of a lifesaving measure. Thus as to abortions, and under the statute of Utah, "unless the life of the mother would be endangered if an abortion was not performed," the procedure would be non-therapeutic, and "not necessary." The "not necessary" standard was apparently taken from Beal v. Doe, 432 U.S. 438, wherein the Court in substance held that a state in its supervision and participation in the Medicaid program was not required to pay for medical procedures which were not necessary including non-therapeutic abortions.

The trial court also concluded that the State of Utah by the statute above quoted had defined therapeutic and non-therapeutic abortions or had determined what was medically necessary and what was not. This distinction was to override what a doctor might determine in an individual case.

We cannot agree with the trial court's definitions and its reading of the several Supreme Court cases. The Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179, rights were examined in Beal v. Doe, 432

U.S. 438, and Maher v. Roe, 432 U.S. 464, as they related to non-therapeutic abortions. The cases create a definite distinction between therapeutic and non-therapeutic abortions. This classification when applied to what is before us as a medically necessary procedure would seem to require us to equate medically necessary with therapeutic.

We also cannot agree that Utah by its life-threatening limitation made a valid distinction by giving weight to or consideration of the health of the woman only in life and death situations. It is apparent that short of the life endangering circumstances there are many other and different and serious conditions which have a direct bearing on what may be the proper medical solution. The severity and the interaction of these conditions must depend on the particular circumstances and on the particular person. The factors cannot be listed or defined by statute and cannot be anticipated. See the listing of possibilities in *Roe v. Wade* to be added to the basic medical problems.

In *Maher v. Roe* the Court said, "the central question in this case is whether the regulation 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'" The Court there, of course, decided a large segment of the funding for abortions issue, but the portion here before us unfortunately was not included. Thus *Maher* decided the funding issue as to non-therapeutic abortions. It so decided that *Roe* did not declare an unqualified Constitutional right to an abortion, but instead decided that the right so de-

clared "protects the woman from unduly burdensome interference with her freedom to decide to terminate her pregnancy." The interest of the woman was there weighed in the absence of considerations as to her health as that factor was not involved. The Court in *Maher*, as in *Roe*, described how the balance between the interest of the woman and the state changed as the pregnancy progressed, again, in the absence of other factors.

We are compelled to add to the *Roe* "rights" on the woman's side of the balance an additional weight. This is the condition of her health, and more particularly is that weight which exists when an abortion becomes a medical procedure necessary to preserve her health. This, in our view, pushes the reading well along the measure toward the standards applicable near the end of her term with the state's portion of the measure or interest thereby progressively reduced. How far this reduction of state interest may go we are not called upon to decide. However, in this appeal we do decide that as to plaintiff, in her second trimester, if the weight is not added, the plaintiff is subjected to an "unduly burdensome interference" as *Maher* describes it. On the other hand, if it is done, the right of this plaintiff on the measure is at a point where the degree of "fundamentalism" places it within that protection afforded a Constitutional right not to be explicitly or implicitly impinged upon. It may not be so impinged upon by the Utah statute here concerned. We so conclude after considering the direct and indirect interference doctrines described in *Maher*, and the explicit and implicit factors

of Dandridge v. Williams, 397 U.S. 471, if there is a difference. We notice when so considered, the Utah statute cannot survive either the compelling state interest test nor the rational test. The condition of the statute thus must be described as terminal.

The unduly burdensome interference was not present in *Maher* because the state could subsidize childbirth and did not need to subsidize a non-therapeutic abortion. There was, the Court there said, room for a value judgment by the state as to funding. The Court said:

> "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."

There is no direct interference in the case before us in the sense of a criminal prohibition, but the state should not be able to make a value judgment to fund necessary medical procedures in all instances except when an abortion is the procedure found necessary. All distinctions between abortions and other procedures are, of course, not prohibited, but the one before us is a distinction applied to a particular condition or diagnosis, and not to all others. This is a distinction which has no relation to health care for which the funds are to be expended. It is difficult to see how this can be placed in a category of a "value judgment" by the state.

Maher speaks of the woman's freedom to *decide* to terminate her pregnancy. It is apparent that this decisional process necessarily includes a consideration of how, when, where, and with what medical and financial

help the course decided upon would be implemented. It is more than just "deciding" as a theoretical matter. The interference by outside agencies on the factors going into the evaluation are thus of great significance. The interference to be unduly burdensome need not, of course, be absolute. But the Utah statute in its diversion of funds for necessary medical treatment from the plaintiff to those requesting funds for medical treatment related to childbirth does create an undue burden on plaintiff's decision to terminate her pregnancy.

Once Utah started down the road to provide health care for indigent persons it came within the Constitutional restrictions as to how it must be done. Doe v. Rose, 499 F.2d 1112 (10th Cir.). Medically necessary procedures cannot then be redefined to exclude treatment directed to a particular condition or treatments excluded that are necessary to meet a particular diagnosis.

It is hard to find a proper place for the rape and incest exceptions, and this is because they should not be there alone. They have been introduced into the state administered programs by Title XIX. They are not medical or health factors, but they are of great magnitude and present a very great tragedy. Obviously these are not the only tragedies which do occur in this context, but when they are listed as the exceptions they must be contrasted to the others. When this is done it becomes apparent that there exists a sound basis for the equal protection argument.

REVERSED.

IN THE

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 78-1675

NOTICE OF APPEAL

D....R...., on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

v.

ANTHONY MITCHELL, et al.,

Defendants-Appellees.

NOTICE IS HEREBY GIVEN that Defendants-Appellees, Anthony W. Mitchell, et al., by and through their attorneys, Robert B. Hansen, Attorney General and Paul M. Tinker, Assistant Attorney General, hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §1254(2) from the Judgment entered March 10, 1980, which held a state statute upon which Defendants-Appellees rely to be invalid as repugnant to the Constitution of the United States.

Defendants-Appellees pray that the Judgment of the Court of Appeals be reversed.

Respectfully submitted this 27th day of May, 1980.

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MAILING CERTIFICATE

I hereby certify that I mailed a true and exact copy of the foregoing Notice of Appeal, postage prepaid, to David S. Dolowitz, PARSONS, BEHLE & LATIMER, Attorneys for Plaintiff-Appellant, at 79 South State Street, No. 200, Salt Lake City, Utah, 84111, on this the 27th day ofMay, 1980.

SANDRA LUNDQUIST